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W. F. Zacharias

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REVOCATION AND REVIVAL OF WILLS

W. F. Zacharias and G. Maschinot*

THE UNINFORMED laymen may think that the existence of a statute dealing with the subject necessarily makes all legal questions clear and free from doubt. The experienced lawyer, on the other hand, is never surprised to discover how little certainty there is to be derived from what would appear to be a complete statutory treatment of any problem. Nowhere does this point seem more evident than over the subject of the legal effect to be given to the revocation of a will which purports, as do so many wills today, to revoke all former wills made by the testator.

The problem thus generated is apt to arise when the testator, having duly executed an earlier will which remains intact at the time of his death,¹ subsequently executes a later will, codicil, or other non-testamentary document by which he either expressly or impliedly revokes the former. Thereafter, the subsequent document is intentionally revoked so as to be no longer operative or entitled to probate at the time of the testator's death. Manifold questions are bound to arise from such course of conduct, not the

* Professor of Law and Associate Professor of Law, Chicago-Kent College of Law, respectively.

¹ The intentional physical destruction thereof, as by burning, tearing, cancelling or the like, will generally result in its invalidation: Page, *The Law of Wills* (W. H. Anderson Co., Cincinnati, Ohio, 1926), 2d Ed. Vol. 1, § 399 et seq. If the earlier will has merely been lost, that fact will not prevent probate if it is otherwise still valid: Page, *op. cit.*, Vol. 1, § 632 et seq.

least of which, of course, is whether the earlier will may be probated or whether the maker of the two instruments must be said to have died intestate. What, on the surface, would appear to be a simple problem calling for a simple answer, can become far more complicated if the subsequent document is a will containing an express clause of revocation or, perhaps, merely impliedly revokes the former because setting up an entirely different scheme of disposition; is a codicil which embodies such an express clause or is silent on the point but substitutes new provisions for old ones, in part or *in toto*; or lastly, is an instrument of nontestamentary character which discloses an intention to revoke the earlier either at once or upon conditions which might never materialize. Assuming, which is often far from the case, that the subsequent document is effective for its purpose immediately upon its execution, there will still arise questions as to whether, by its destruction, the original will is automatically revived by operation of law, must be re-executed to have probative effect, or need merely be republished. Going still further, subordinate problems will spring up as to whether parol proof is admissible to establish the testator's intention at the time of the destruction of the later instrument or whether any presumptions, for or against the revival of the earlier will, may be indulged in with respect thereto. These, and other questions inherent in the general problem, have received a variety of answers, both judicial and statutory, to the point where it might almost be said that the law is in a state of total confusion and sadly in need of clarification. So great a conflict upon a question of vital importance to the objects of a testator's bounty ought to find resolution if possible,² hence the following discussion may prove helpful by suggesting lines along which clarification might be sought.

No little of the confusion has been produced by failure to

² It is not the purpose of the authors to propose any kind of uniform statute on the subject, for they are inclined to leave the peoples of each state, in all fields of law, free to have the most widely differing views that they may choose. But one who comes into a new jurisdiction, or simply wants to know the law of his own or some other state, should find the answer without being obliged to wait for test cases to reach supreme courts.

recognize that the modern last will and testament is really a composite document consisting of a "will" by which land may be devised and a "testament" designed to distribute the personal estate of the testator; the former finding its authority in the early English statutes³ while the latter, being primarily of ecclesiastical cognizance,⁴ has been affected by the doctrines of the civil law. Indiscriminate use of terminology as well as of the basic ideas underlying the two forms of disposing of property after death have produced a maze that is difficult to follow. It may be helpful, however, to trace the English developments first and then compare or contrast them with those produced in this country. At the same time, existing literature on the subject may be brought down to date.⁵

I. REVOCATION AND REVIVAL IN ENGLAND

As the original Statute of Wills⁶ spoke only as to the authority for, and manner of making, a will and was silent on the subject of revocation, the courts of that country were free for a long period to decide how revocation should be accomplished and also whether revival of an earlier will was possible. Regarding the intention to revoke as being the important thing, the courts soon came to recognize, following the ecclesiastical idea, that oral

³ 32 Hen. VIII, c. 1 (1540) and 34 & 35 Hen. VIII, c. 5 (1542). These statutes, as a part of the common law, have passed into the jurisprudence of most American states. See Ill. Rev. Stat. 1945, Ch. 28.

⁴ 2 Bl. Com., 499.

⁵ Jarman on Wills (Sweet & Maxwell, Ltd., London, 1930), 7th Ed. by C. P. Sanger, Vol. 1, Chaps. 7-8; Redfield, Law and Practice of Surrogates' Courts (Baker, Voorhis & Co., New York, 1894), 5th Ed., pp. 195-203; Rollison, The Law of Wills (Callaghan & Co., Chicago, 1939), pp. 252-8 and 287-302; Schouler on Wills, Executors and Administrators (Matthew Bender & Co., Albany, New York, 1915), 5th Ed., §§ 404-23; Page, The Law of Wills (W. H. Anderson Co., Cincinnati, Ohio, 1926), 2d Ed., Vol. 1, § 399 et seq.; Thompson on Wills (The Bobbs-Merrill Co., Indianapolis, 1936), 2d Ed., Chaps. 10-1; Underhill, A Treatise on the Law of Wills (T. H. Flood & Co., Chicago, 1900), Vol. 1, pp. 302-65. See also Atkinson, Handbook of the Law of Wills (West Publishing Co., St. Paul, 1937), pp. 379-85 and 421-5. Major articles on the subject may be found in Roberts, "The Revival of a Prior by the Revocation of a Later Will," 48 U. of Pa. L. Rev. 505 (1900); W. W. Ferrier, Jr., "Revival of a Revoked Will," 28 Cal. L. Rev. 265 (1940); and Bordwell, "The Statute of Wills—Part XII," 14 Iowa L. Rev. 283 (1929). Miscellaneous case notes to specific cases will be noted hereafter in conjunction with the discussion of each particular case.

⁶ See note 3, ante.

revocation was sufficient⁷ although the same result might be accomplished by the making of a later will.⁸ Since the permitting of oral revocation could lead to fraud and perjury,⁹ it was deemed wise to include provisions in the Statute of Frauds to the effect that no will or testament should be revoked save by intentional physical destruction on the part of the testator or his agent or "by some other will or codicil in writing, or other writing" duly signed and witnessed.¹⁰ The statute was silent, however, as to when the revoking instrument was to take effect so the door was left open for judicial determination as to its operative consequences.

A. AS TO TESTAMENTS

Inasmuch as the earlier instrument sought to be revoked might be either a will or a testament, hence be likely to provoke questions in either a common law or an ecclesiastical court, the way thus opened invited conflicting decisions. The ecclesiastical treatment of the problem, following civil law lines, was to the effect that the revoking instrument operated from the moment of its proper execution,¹¹ hence immediately nullified the earlier testament; the mere fact that the earlier document remained in full physical existence was of no significance. That view is best

⁷ Swinburne, *A Treatise of Testaments and Last Wills* (London, 1677), 4th Ed., Part VII, § 15.

⁸ 2 Bl. Com., 502.

⁹ The history of a conspiracy to defeat a will on such lines is told in a note to *Mathews v. Warner*, 4 Ves. Jr. 186, 31 Eng. Rep. 96 at 107 (1798), which refers to the manuscript of Lord Nottingham on the case of *Cole v. Mordaunt* (1676). The judge is reported to have said: "I hope to see one day a law, that no written will should be revoked but by writing." The annotator says: "This is said to be the principal case which gave rise to the Statute of Frauds."

¹⁰ 29 Car. II, c. 3 (1677). Section 6 thereof, relating to wills, required that the revoking instrument be signed in the presence of "three or four" witnesses. Section 22, concerning testaments, forbade the repeal thereof "by word of mouth only, except the same be in the life of the testator committed to writing . . . read unto the testator, and allowed by him and proved to be done by three witnesses at the least." Similar legislation, found in almost every American jurisdiction, is noted hereafter and has been given mandatory effect. As a consequence, the problem of reviving an earlier will cannot arise unless the subsequent writing complies with the Statute of Frauds: *Beard v. Beard*, 3 Atk. 72, 26 Eng. Rep. 844 (1744).

¹¹ In *Onions v. Tyrer*, 1 P. Wms. 344, 24 Eng. Rep. 418 (1716), it had been determined that a second will containing an express clause of revocation, duly executed but for the fact that the witnesses did not subscribe their names in the testator's presence, did not revoke an earlier will. As a consequence, the heir at law was enjoined from conducting an ejectment action against the devisee under the first will.

illustrated by the decision of the Prerogative Court in *Helyar v. Helyar*,¹² wherein the testator, after making a will in 1742, made another in 1745 which contained an express clause revoking all former wills, named a different executor and omitted a devise given under the earlier will. At the time of the testator's death, the will of 1742 was found in his trunk but no trace could be discovered of the later will although it had last been seen in the testator's hands.¹³ Oral proof of the quondam existence of the later will and of its contents was received and, on the strength thereof, it was held that the execution of the second will was, by law, a revocation of the first.

It was then argued that the first had been revived by the subsequent destruction of the second one. On that point, the court said the deceased had not done any act sufficient to revive the earlier will, indicating that, in order to revive, there had to be a "republication or some express declaration of the testator that he would have the first operate as his will."¹⁴ Revival of the earlier will was, then, considered possible so long as evidence could be offered to show that such was the testator's intention. While apparently no presumption would be indulged in merely because the earlier testamentary document remained in physical existence and the later one had been cancelled,¹⁵ there was evidence of one sort or another in the succeeding cases that the

¹² 1 Lee Ecc. 472, 161 Eng. Rep. 174 (1754). Initial steps of an appeal from that decision may be noted in *Ex parte Hellier*, 3 Atk. 798, 26 Eng. Rep. 1256 (1754), but the appeal was subsequently abandoned by agreement. See 161 Eng. Rep. 174 at 190, note (c).

¹³ According to the facts in *Daniel v. Nockolds*, 3 Hagg. Ecc. 777, 162 Eng. Rep. 1341 (1832), a will dated in 1819 had been found carefully deposited and locked in a drawer in the testator's bedroom. Another will, dated in 1823, containing different terms and an express clause of revocation, was found in the same room but much soiled and crumpled and lying among old and useless papers. Both were offered for probate. The court, accepting only the later will, said: "... here is a later revocatory will entire and in force as a revocation of the former, though the devises and bequests may have lapsed . . . why did not the deceased, a professional man, cancel if he intended to revoke it and revive the former will? Declarations without acts are always dangerous evidence. . . ."

¹⁴ 1 Lee Ecc. 472 at 512, 161 Eng. Rep. 174 at 189.

¹⁵ The headnote to *Usticke v. Bawden*, 2 Add. Ecc. 116, 162 Eng. Rep. 238 (1824), declares that "... to the revival of a former [will] uncanceled, upon the cancellation of a latter revocatory will, the legal presumption is neither favorable to nor adverse. The law, having furnished that principle, retires; and leaves the question one of intention merely, and open to a decision either way, according to extrinsic facts and circumstances."

testator either did¹⁶ or did not¹⁷ intend to revive the earlier will so no occasion arose to settle other problems posed in situations like the one under consideration.

B. AS TO WILLS

While these precedents were being established in the ecclesiastical tribunals concerning testaments, the common-law courts were faced with substantially similar questions over wills. In the first such case,¹⁸ that of *Goodright v. Glazier*,¹⁹ Lord Mansfield declared:

A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will: if he does not suffer it to do so, it is not his will. Here, he had two. He has cancelled the second: it has no effect, no operation; it is no will at all, being cancelled before his death. But the former, which was never cancelled, stands as his will.²⁰

The fact that the second will contained an express clause of revocation and was not merely inconsistent with the first appears to have been regarded as producing a distinction without a differ-

¹⁶ Thus, in *Usticke v. Bawden*, 2 Add. Ecc. 116, 162 Eng. Rep. 238 (1824), and in *Welch v. Phillips*, 1 Moore P. C. 299, 12 Eng. Rep. 828 (1836), oral statements by testator shortly before death were held sufficient to disclose an intent to revive. In *Kirkeudbright v. Kirkeudbright*, 1 Hagg. Ecc. 325, 162 Eng. Rep. 601 (1828), the testator had made a will in 1824 giving all his estate to his wife. In 1825, during a period of separation, he made a new will giving a legacy to his paramour but which, he later said, he had done "to please the girl and prevent her from relaxing in her attentions to me." This will was never thereafter found. Resumption of cohabitation with his wife as well as declarations of the testator during his last illness were held sufficient to produce a revival even assuming the 1825 will to the paramour had been executed with testamentary intention.

¹⁷ Intestacy was declared in *Moore v. Moore*, 1 Phill. Ecc. 375, 161 Eng. Rep. 1016 (1816), *Hooten v. Head*, 3 Phill. Ecc. 26, 161 Eng. Rep. 1247 (1819), and in *Wilson v. Wilson*, 3 Phill. Ecc. 543, 161 Eng. Rep. 1409 (1821), for the court there found that the tenor of the testator's declarations, following upon the cancellation of a second will with express revocatory clause, were to the effect that if he did not make a new will he would die without one.

¹⁸ *Eggleston v. Speke*, 3 Mod. 258, 87 Eng. Rep. 170 (1688), was actually earlier in point of time, but the case passed on the ground that the second instrument was insufficient, under the Statute of Frauds, to revoke the earlier will because not subscribed by the witnesses in the testator's presence. See also *Onions v. Tyrer*, 1 P. Wms. 344, 24 Eng. Rep. 418 (1716).

¹⁹ 4 Burr. 2512, 98 Eng. Rep. 317 (1770).

²⁰ 4 Burr. 2512 at 2514, 98 Eng. Rep. 317 at 319.

ence, if that fact was not entirely overlooked.²¹ Nowhere does the word "revival" appear in the opinion, so it might be inferred that the first will, according to the common law, continued to have potential effect throughout hence did not need to be brought back into existence after the danger threatened by the presence of a subsequent will was removed by its destruction. That, at least, would be a logical sequitur to the basic concept that a will is an ambulatory instrument prior to the time of the testator's death.

Some doubt on that score may be conceived from what Lord Mansfield said, four years later, when deciding the case of *Harwood v. Goodright*.²² He there stated:

. . . it may be said, that if there is a complete second will, it cannot do otherwise than revoke a former: for if it is only a variation or subtraction from a former will, it is in the nature of a codicil . . . The mere circumstance of making a second will is not in itself a revocation of a former: for the testator may cancel such latter will, and it has been settled that if a man by a second will even revoke a former, yet if he keep the first will undestroyed, and afterwards destroy the second, *the first will is revived*.²³

It is a trifle inconsistent to say that the earlier will is not revoked by the execution of a second one yet at the same time say that it is revived by the destruction of the later one. It either continues in legal existence as a potential instrument or else is nullified. If the former, revival is unnecessary; if the latter, then the common-law views as to revival came extremely close to those followed by the ecclesiastical courts except that, seemingly, some presumption in favor of testacy rather than intestacy might be

²¹ A note to *Goodright v. Glazier*, to be found in 98 Eng. Rep. 317, says: "It appears from the quotation of this case in Buller, 266, that the second will expressly revoked all former wills; and . . . this is not taken notice of by Burrow, as it seems it ought to have been, for that is a usual clause in wills, and the omission of it may, in the opinion of some persons, make a distinction between this case, and other wills having such a clause of revocation."

²² 1 Cowp. 87, 98 Eng. Rep. 981 (1774).

²³ 1 Cowp. 87 at 90, 98 Eng. Rep. 981 at 983.

drawn from the fact that the earlier will had been preserved.²⁴ Such view, however, overlooks the possibility that the testator may have intended to die intestate under the belief that the first will had been nullified by the execution of the second and that that instrument, in turn, was nullified at the time of its destruction or cancellation.²⁵

C. STATUTORY TREATMENT

The resulting confusion from these conflicting views, a confusion which might lead to the result that an instrument would be ineffective to pass the personal estate but could operate to devise land, eventually led to the enactment of a statute in 1837 which purported to settle all questions. While that statute recodified the ideas underlying the Statute of Frauds concerning revocation, it also purported to deal with the subject of revival by requiring re-execution of the earlier will and testament at the time of the destruction of the later one.²⁶ The statute may be said to have adopted the essence of the ecclesiastical ideas on the subject but it does not expressly specify that the former will is revoked at the moment of execution of the later one, so while the difficulties have been lessened by its existence they have not been entirely eliminated.

The English decisions since the enactment of that statute fall into one of three categories. The first concerns itself with the problem of whether or not the later will or codicil was executed²⁷

²⁴ In *Burtenshaw v. Gilbert*, 1 Cowp. 49, 98 Eng. Rep. 961, Lofft 465, 98 Eng. Rep. 750 (1774), Lord Mansfield held that if the first will is subjected to physical destruction, such as tearing off the seals, the fact that a subsequent will was also subsequently destroyed could not alone operate to revive the earlier one. He there indicated that it could never be set up "but by a new instrument of republication."

²⁵ See cases cited in note 17, ante.

²⁶ 1 Vict., c. 26, § 22. The statute directs that "no Will or Codicil, or any part thereof, which shall be in any Manner revoked, shall be revived otherwise than by the Re-execution thereof, or by a Codicil executed in the manner herein-before required, and showing an intention to revive the same; and when any Will or Codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such Revival shall not extend to so much thereof as shall have been revoked before the Revocation of the whole thereof, unless an Intention to the contrary shall be shown."

²⁷ In *Lister v. Smith*, 3 Sw. & Tr. 282, 164 Eng. Rep. 1282 (1863), it appeared that testator executed a codicil to his will, expressly revoking a gift in trust for the benefit of his daughter, more as a sham to get the daughter, who was informed

or revoked²⁸ under circumstances indicating only a conditional purpose on the part of the testator so as not squarely to present the problem here concerned.²⁹

In the second, the subsequent will or codicil was found to contain an express clause designed to revoke the former will either wholly or in part. The subsequent destruction of the later will or codicil, even though the earlier will remained in existence, was treated as evidencing an intention to die wholly or partially intestate³⁰ so long as no steps were taken, in the fashion directed by the statute, to revive the earlier will. Oral declarations that such was the testator's intention have been uniformly rejected as being inadmissible without regard to what the law might have been prior to the adoption of the statute.³¹ Rigid adherence to this view has been given, even though the later will or codicil itself failed for violation of other rules of law,³² so long as the

of the revocation, to persuade her mother-in-law to compromise a dispute between testator and the mother-in-law. The will without the codicil was ordered probated after the jury was cautioned that the admission of oral testimony of such alleged circumstances tended to "make wills . . . very insecure if a regularly executed document . . . can be set aside on evidence of the sort you have just heard. . . ."

²⁸ See *Powell v. Powell*, L. R. 1 P. D. 209 (1866). In *Dickinson v. Swatman*, 4 Sw. & Tr. (Supp.) 205, 164 Eng. Rep. 1465 (1860), it was argued that testator had burned his later will under the erroneous belief that he thereby revived the earlier one, so that, if the first will had been effectively nullified, a copy of the later one should be admitted to probate. It was held that, for lack of proof of such purpose, the decedent died intestate.

²⁹ The subject of dependent relative revocation is not here considered.

³⁰ *Major & Mundy v. Williams & Iles*, 3 Curt. Ecc. 432, 163 Eng. Rep. 781 (1843); *James v. Cohen*, 3 Curt. Ecc. 770, 163 Eng. Rep. 896 (1844); *Tupper v. Tupper*, 1 K. & J. 665, 67 Eng. Rep. 627 (1855); *Brown v. Brown*, 8 El. & Bl. 876, 120 Eng. Rep. 327 (1858); *Wood v. Wood*, L. R. 1 P. D. 309 (1867); In the Goods of *Debac*, 77 L. T. Rep. 374 (1897); In the Goods of *Chilcott*, [1897] P. D. 223; *Barkwell v. Barkwell*, [1928] P. D. 91; *Goldie v. Adam*, [1938] P. D. 85; in the Estate of *Mordon*, [1944] P. D. 109.

³¹ The court, in *Major & Munday v. Williams & Iles*, 3 Curt. Ecc. 432 at 434-5, 163 Eng. Rep. 781 at 782 (1843), said: "There have undoubtedly been cases, decided over and over again under the Statute of Frauds, holding that parol evidence was admissible to prove the revival of a once revoked instrument. It was this that led to the introduction of the 20th and 22nd sections into the present Wills Act. It is admitted . . . the first will was revoked. . . . The only mode by which it could be revived is that pointed out by the 22nd section. That section is most express . . . destruction of the revoking instrument is not sufficient, it is not a re-execution of the revoked will, according to the present act."

³² *Tupper v. Tupper*, 1 K. & J. 665, 69 Eng. Rep. 627 (1855), concerned a codicil revoking a valid bequest and purporting to give the fund to charitable uses. Held: although the charity could not receive the benefit of the gift, the codicil operated as a revocatory instrument. *Onions v. Tyrer*, 1 P. Wms. 344, 24 Eng. Rep. 418 (1716), was distinguished. See also *In re Burnyeat's Will*, 128 L. T. Rep. 751 (1923), noted in 23 Mich. L. Rev. 86, although there the codicil merely set forth

subsequent instrument was duly executed. It might also be noted that, although the statute does not say so, courts have declared that the subsequent instrument operated instantly upon execution so far as revocation was concerned even though it was still ambulatory in character as a dispositive document.³³

Where the testator, in attempted compliance with the statute, has endeavored to revive the earlier will, revoked by an express clause found in some subsequently executed instrument, his efforts have not always met with complete success. Thus, in the case of *In the Goods of Chilcott*,³⁴ the testatrix, having made a will in 1889, instructed her solicitor to prepare a codicil which she took away but never executed. Instead, she executed a fresh will, in 1892, prepared by another solicitor, which expressly revoked the former one. In 1893, she executed a codicil, prepared by her original solicitor who was in ignorance of the existence of the 1892 will, which purported to be a second codicil to the will of 1889 and by which she indicated a desire to "confirm my said will and the first codicil thereto." All of these documents remained in existence at the time of her death. It was held that the codicil served to revive both the 1889 and the 1892 will so that both wills and the codicil had to be admitted to probate.

A somewhat similar mishap occurred in the case of *Goldie v. Adam*³⁵ where the testator made a will and three codicils in 1929 and then marked a prior will as being cancelled. In 1932 he made another will expressly revoking the 1929 will together with its codicils. One year later, in 1933, he executed a testamentary document expressed to be a fourth codicil to the revoked

a different scheme of disposition and did not expressly revoke the earlier provision. Express revocation would have been unwise since the codicil was designed to operate only if testator's widow married a person other than a natural-born British subject. When the widow did marry an alien, the net result of testator's failure to observe the requirements of the Rule against Perpetuities was to give her a share of the estate by descent despite the obvious intention to cut her off with nothing. Cf., *Baker v. Story*, 31 L. T. Rep. 631 (1874).

³³ Lord Merrivale, in *Barkwell v. Barkwell*, [1928] P. D. 91 at 101, declared: "Cases beyond number have made it clear that words of revocation contained in a will operate immediately upon its execution, so effectually, that without some express act of revivor the revoked testament has thenceforward no existence."

³⁴ [1897] P. D. 223.

³⁵ [1938] P. D. 85.

will of 1929, referring to it by date, and concluded with the statement: "In all other respects I confirm my said will and the first three codicils thereto," but said nothing about the 1932 instrument. All the documents were found in perfect condition. It was held that the mistaken reference, in the last codicil, to the 1929 will did not revive it, so only the 1932 will and the 1933 codicil, after deleting the mistaken reference, could be admitted to probate. That result was achieved by finding that when the testator referred to the 1929 will he really meant to say the 1932 one and when it was revived *in toto*, including the express clause of revocation therein, it then served to completely and finally nullify the earlier will. The holding is logical, but the underlying assumption that the testator had made a mistaken reference is not too clearly borne out. By contrast, in the case of *In the Estate of Mordon*,³⁶ it was apparent that at the time the testatrix had executed a codicil to her first will she had forgotten about the existence of two subsequent wills each containing an express clause of revocation. As her codicil did not contain a clause confirming her first will in all respects, so thereby failing to revive a clause of revocation contained therein, it was held necessary to grant probate to the third will, to the expressly confirmed parts of the first one, and to the last codicil. It would seem, therefore, that the testator seeking to revive an earlier will which has been once revoked because of the existence of a later testamentary document so directing must exercise considerable care if he expects to accomplish his purpose.

The third category of cases includes those in which there is no express clause of revocation in the subsequent instrument but in which some other language may or may not be found sufficient to produce that result so as to require, or make unnecessary, a positive act of revival. The phrase most frequently seized upon for this purpose is the common recital that the document is the "last will and testament" of the testator. The question was first presented in the case of *Plenty v. West*³⁷ where the King's Bench

³⁶ [1944] P. D. 109.

³⁷ 6 C. B. 201, 136 Eng. Rep. 1227 (1848).

Court, in response to an inquiry propounded by the Chancellor, declared that the last of the three wills, each bearing the designation of "last will and testament," was the only one possessing validity. There was no explanation given for such holding and it would seem unfortunate in view of the fact that, while the wills varied to some extent, the last one made only a partial distribution of the estate. A more sensible view would have been to permit the three wills to stand together to the extent that they did not conflict with one another. While there is intimation that the decision therein was shortly thereafter overruled by the holding in *Cutto v. Gilbert*,³⁸ it has been followed in at least four cases decided thereafter,³⁹ even to the point of admitting parole evidence to show that the last document was intended to be the sole and only will.

In direct contrast, is the holding of the Chancellor in *Freeman v. Freeman*⁴⁰ wherein an injunction against an ejectment action brought by the heir was granted in favor of a devisee under an earlier will which had remained in existence even though the testator had made a later document designated as a "last will and testament" but which dealt only with some of the testator's property and was silent as to the land in question. The Chancellor indicated that a different result might have followed had the testator written "this is my *only* will," but since he did not it was deemed possible for both instruments to stand together, particularly since there was no evidence of a design to die partially intestate.

No court came nearer to producing an unjust result than the one concerned in the case of *Cutto v. Gilbert*.⁴¹ The testator there

³⁸ 9 Moore P. C. 131, 14 Eng. Rep. 247 (1854). The Privy Council, however, merely purported to distinguish the case before it from the one presented in *Plenty v. West*.

³⁹ See *Dempsey v. Lawson*, L. R. 2 P. D. 98 (1877); *Jenner v. Finch*, 5 P. D. 106 (1879); *Estate of Bryan*, [1907] P. D. 125; In the *Estate of Fawcett*, [1941] P. D. 85. In the last mentioned case, a holographic instrument which lacked a revocatory clause and did not state it was a "last will" was, nevertheless, given effect since it could be construed to constitute a complete and different disposition of the estate.

⁴⁰ 5 DeG. M. & G. 704, 43 Eng. Rep. 1044 (1854).

⁴¹ 9 Moore P. C. 131, 14 Eng. Rep. 247 (1854).

had executed a will in 1825 which remained uncanceled at the time of his death. Witnesses testified that he had, in 1852, executed a document designated as a "last will and testament" but they were unable to disclose the nature of its contents, whether similar to or different from the earlier will, nor could they provide any more information as to its whereabouts beyond the fact that it was last seen in the possession of the testator. The Prerogative Court held, in the absence of proof of any revival, that the will of 1825 had been effectively revoked and that the decedent had died intestate. The Privy Council, on appeal, reversed and ordered the earlier will probated because it refused to assume that the later will was inconsistent with the earlier one or in any way operated to revoke it. The appellant, beneficiary under the earlier will, was granted the estate. A few months later, according to a note appended to the decision,⁴² the successful appellant accidentally discovered a will, dated in 1851 and obviously the one referred to by the witnesses, standing upright in a drawer in such a position as to be readily overlooked. That will, following the dispositions contained in the one dated in 1825, gave everything to appellant so the Privy Council was proved to be right after all. Had it followed the rationale of the decision in *Plenty v. West*,⁴³ a clearly unjust result would have been produced.

A somewhat similar result was obtained in *Cadell v. Wilcocks*.⁴⁴ In that case, the testatrix had made a will in 1890 by which she purported to exercise a power of appointment as well as to make disposition of her own estate. A second will, made in 1894, lacked an express clause of revocation but made some changes in the scheme of disposition. A third will, made in 1895, designated as a "last will and testament" but lacking in an express clause of revocation purported to give all of testatrix's property to one daughter absolutely. Neither the second nor the third will sufficed to exercise the power of appointment. It was, nevertheless, held that the 1890 and the 1895 wills should stand

⁴² 9 Moore P. C. 131 at 148, 14 Eng. Rep. 247 at 254.

⁴³ See note 37, ante.

⁴⁴ 78 L. T. Rep. 83 (1897).

and be probated together for there was nothing in the second or third wills which could be regarded as being inconsistent with the intended exercise of the power of appointment albeit they both were designated as "last" wills.⁴⁵ As the English statute is vague on the point as to whether or not the subsequent will or codicil should declare an intention to revoke the former will,⁴⁶ the holdings in the three cases last mentioned ought to be approved as more in keeping with the probable intention of the testator for the use of the phrase "last will and testament," especially when found in some printed form purchased for the testator's own use, can hardly be said to evidence a clear intention to revoke a former will.

Any discussion of the English cases ought not be concluded without reference to the decision in the case of *In the Goods of Hodgkinson*.⁴⁷ The testator there concerned had made a will in June, 1881, giving "all my property of every description" to a friend. In September, 1881, he made a second will giving "the share and interest" he had received under the will of his lately deceased mother to his sister. The second will lacked any clause of revocation and was not described as a last will. The property therein referred to was real estate and the only real estate he possessed at the time of his death. The second will was subsequently cancelled by cutting off the signature. The trial court admitted the whole will of June, 1881, to probate. On appeal, the decision was modified on the ground that the first will had been revoked in part and had not been revived while the second

⁴⁵ The court cited the case of *Re Kingdon*, 54 L. T. Rep. 753, 32 Ch. Div. 604 (1886), as holding that an express revocatory clause in a later will would operate to revoke an earlier one, including a purported exercise of a power of appointment therein, even though no subsequent provision was made relating to the subject matter of the power of appointment.

⁴⁶ 1 Vict., c. 26, § 20, declares that no earlier will shall be revoked otherwise than "by another Will or Codicil executed in the manner herein-before required, *or* by some Writing declaring an intention to revoke the same." Italics added. If the word "or" is truly disjunctive, the mere execution of a subsequent will or codicil should serve to revoke a former one, whether so stating or not, unless the same is in some way re-executed and revived pursuant to Section 22. If, on the other hand, the phrase "declaring an intention to revoke the same" applies not only to some writing but also to subsequent wills or codicils, then the denial of probate to earlier instruments in the cases cited in note 39, ante, is erroneous and the earlier wills should have been admitted and any discrepancy between them and the later wills should have been resolved as a matter of construction.

⁴⁷ L. R. 18 P. D. 339 (1893).

will was not operative as to the property therein referred to since it had been effectively cancelled. As a consequence, the decedent was held to have died intestate as to the realty. Such decision suggests that, without regard to whether or not the subsequent will so states and whether or not it is described as a "last" will, the mere making of a subsequent will containing different provisions than those contained in an earlier one will suffice to revoke the earlier one, either in whole or in part, so that re-execution of the former is necessary if it is to be revived in any respect.

In the light of the statute and the decisions interpreting it, the present state of the English law might be summarized about as follows. Assuming (1) that the subsequent instrument is executed with the requisite intent, then (2) if it contains an express clause of revocation, some act of revival satisfying the requirements of the statute is essential to give new life to the earlier will and parol declarations will not be enough any more than would the mere destruction of the subsequent instrument, but (3) that same result may or may not be obtained if the subsequent document, while lacking an express clause of revocation, be designated as a "last will" or presents a different scheme of disposition, except (4) in the latter case, the earlier instrument, if it be not revoked, must be read along with the later one.

II. REVOCATION AND REVIVAL UNDER AMERICAN LAW

A. STATUTES AS TO REVOCATION*

Every one of the states in the United States, as well as the District of Columbia and the Territory of Hawaii, possesses a statute of some sort dealing with the subject of revoking a will through the execution of some subsequent instrument but for two

* Unless otherwise indicated, the statutes hereinafter referred to merely by name of the state are, for convenience, here cited alphabetically: Alabama, Code 1940, Tit. 61, §§ 26-7; Arizona, Code Ann. 1939, Ch. 41, § 103; Arkansas, Pope Dig. 1937, §§ 14519 and 14528; California, Deering Probate Code Ann. 1944, Ch. 3, §§ 72, 74 and 75; Colorado, Stats. Ann. 1935, Vol. 4, Ch. 176, § 40; Connecticut, Gen. Stats. 1930, Tit. 50, Ch. 256, § 4880; Delaware, Rev. Code 1935, Ch. 93, § 3715; District of Columbia, Code 1940, Tit. 19, §§ 103 and 108; Florida, Stats. 1941, Tit. 41, Ch. 731, §§ 731.13, 731.15, 731.17 and 731.18; Georgia, Code 1933, Ch. 113, §§ 401-3 and 406; Hawaii, Rev. Laws 1943, Tit. 31, Ch. 295, §§ 12177-8 and 12182; Idaho, Code Ann. 1932, Vol. 1, Tit. 14, §§ 14-307 and 14-310; Illinois, Rev. Stat. 1945,

noteworthy exceptions. The Oregon statute appears to be wholly silent on the point, while that of Tennessee provides simply that no nuncupative will shall affect an existing written will unless it be reduced to writing, read to and approved by the testator, and thereafter be proved by at least two competent witnesses.⁴⁸ It will be remembered that the English statute specifies that neither a will, a codicil, nor any part of either shall be revoked, at least so far as is here concerned, except by (1) another will, (2) a codicil, or (3) some other writing declaring an intention to revoke and duly executed according to the manner made necessary for the proper execution of a will in the first instance.⁴⁹ Any analysis of the American statutes may well be built around that model but, with the exceptions noted, it might be observed at the outset that the American statutes present no uniform pattern.

Ch. 3, § 197; Indiana, Burns Ind. Stat. Ann. 1933, Vol. 3, Ch. 3, § 7-301; Iowa, Code 1946, Vol. 2, Ch. 633, § 633.10; Kansas, Gen. Stat. 1945 Supp., Ch. 59, §§ 611-2; Kentucky, Rev. Stat. 1946, Ch. 394, §§ 394.080 and 394.100; Louisiana, Dart Civ. Code 1945, Vol. 1, Ch. 6, Arts. 1690-4; Maine, Rev. Stat. 1944, Vol. 2, Ch. 155, § 3; Maryland, Ann. Code 1939, Vol. 2, Art. 93, § 337; Massachusetts, Ann. Laws 1933, Vol. 6, Ch. 191, § 8; Michigan, Stats. Ann. 1937, 1943 Revis., Vol. 23, Ch. 266, § 27.3178(79); Minnesota, Stats. 1941, Ch. 525, § 525.19; Mississippi, Code Ann. 1930, Ch. 72, § 3551; Missouri, Rev. Stat. Ann. 1939, Vol. 1, Ch. 1, Art. 20, §§ 521 and 525; Montana, Rev. Code 1935, Vol. 3, Ch. 77, §§ 6995, 6998 and 6999; Nebraska, Rev. Stats. 1943, Vol. 2, Ch. 30, Art. 2, § 30-209; Nevada, Comp. Laws 1929, Vol. 4, §§ 9912-3; New Hampshire, Rev. Laws 1942, Vol. 2, Ch. 350, § 13; New Jersey, Stat. Ann. (Perm. Ed.), Tit. 3, Ch. 2, § 3:2-4; New Mexico, Stats. Ann. 1941, Vol. 2, Ch. 32, §§ 108-9; New York, Thompson Cons. Laws 1939, Vol. 1, Decedent Estate Law, §§ 34 and 41; North Carolina, Gen. Stats. 1943, Vol. 2, Ch. 31, § 31-5; North Dakota, Rev. Code 1943, Vol. 5, Ch. 56-04; §§ 56-041, 56-0405 and 56-0408; Ohio, Page's Gen. Code Ann., Vol. 7, Ch. 4, §§ 10504-47 and 10504-54; Oklahoma, Stats. Ann. (Perm. Ed.), Tit. 84, Ch. 2, §§ 101, 105 and 106; Oregon, Comp. Laws Ann. 1940, Vol. 2, Tit. 18, Ch. 3, § 18-304; Pennsylvania, Purdon's Stats. Ann., Tit. 20, Ch. 2, §§ 271-2; Rhode Island, Gen. Laws 1938, Ch. 566, § 17; South Carolina, Code 1942, Vol. 4, Ch. 175, § 8921; South Dakota, Code 1939, Vol. 3, Tit. 56, Ch. 56.02, §§ 56.0217, 56.0221-2; Tennessee, Williams' Code Ann. 1934, Vol. 5, Tit. 3, Ch. 1, § 8097; Texas, Vernon's Civ. Stat. Ann., Vol. 22, Tit. 129, Art. 8285; Utah, Code Ann. 1943, Vol. 5, Tit. 101, Ch. 1, §§ 101-1-19, 101-1-22, 101-1-23; Vermont, Pub. Laws 1933, Tit. 12, Ch. 117, § 2756; Virginia, Code 1942, Ch. 212, §§ 5233-4; Washington, Remington's Rev. Stat. Ann. 1932, Vol. 3, Tit. 10, Ch. 3, §§ 1398 and 1405; West Virginia, Code Ann. 1943, Ch. 41, §§ 4045-6; Wisconsin, Stats. 1945, Ch. 238, § 238.14; Wyoming, Comp. Stats. Ann. 1945, Vol. 1, Ch. 6, § 6-306.

⁴⁸ Tenn., Williams Code Ann. 1934; Vol. 5, Tit. 3, Ch. 1, § 8097. That statute makes no mention of the typical means of revocation to be found available in the other states. It, and the one in Pennsylvania, are the only ones which seem to have carried over the ideas found in Section 22 of the Statute of Frauds relating to the revocation of wills or testaments concerning personal property. See Purdon's Pa. Stat. Ann., Tit. 20, Ch. 2, § 272.

⁴⁹ 1 Vict., c. 26, § 20. See also Section 6 of the Statute of Frauds. The latter specified that the "other writing" had to be signed in the "presence of three or four witnesses." The former merely declares it shall be executed "in the Manner in which a Will is herein-before required to be executed."

1. *Revocation by Subsequent Will*

Most of the statutes provide that the revocation may be produced by the execution of some subsequent will,⁵⁰ but there any degree of similarity ceases. Only in the case of Georgia,⁵¹ and perhaps Louisiana,⁵² is there any express indication that the act of executing the second or subsequent will shall possess any immediate effect upon the first or former one. Only by inference can it be gathered from some of the other statutes that the second will might perform that immediate function; an inference which might be gleaned where the statute declares that the revoking will shall contain an express clause of revocation.⁵³ Whether or not such an inference would be warranted under certain of the other statutes could be settled only after careful application of the rules governing the grammatical construction thereof for the phrasing is such that the requirement of an expressed revocative intent, necessary when some writing other than a will is used, might also apply to a subsequent will.

The English statute, in the phrase "by another Will or Codicil . . . or by some Writing declaring an intention to revoke,"⁵⁴ seems to use the disjunctive "or" and would lead one to believe that the words "declaring an intention to revoke," indicating the necessity for some sort of express revocatory clause, are designed to apply only to some writing other than a will or codicil. The juxtaposition of the three forms of revocation in the same statutory paragraph, as found in a number of the American statutes, after giving due recognition to punctuation, might or might not produce the same conclusion. It might, on the one hand, be argued that phrases similar to the English statu-

⁵⁰ Burns Ind. Stat. Ann. 1933, Vol. 3, Ch. 3, § 7-301, and Mass. Ann. Laws 1933, Vol. 6, Ch. 191, § 8, merely refer to some "other writing" for that purpose, but since such writing must be signed, attested and subscribed in identical fashion to a will it could clearly be inferred that a second will would be sufficient.

⁵¹ Ga. Code 1933, Ch. 113, § 402, states: "An express revocation is effected when the maker by writing or acts annuls the instrument . . . [It] takes effect instantly or independently of the validity or ultimate fate of the will or other instrument containing the revocation."

⁵² See Dart Civ. Code 1945, Vol. 1, Ch. 6, § 6, Art. 1694.

⁵³ In this category are the statutes of Cal., Colo., Ill., Ia., N. Jers., N. Mex., and Okla.

⁵⁴ 1 Vict., c. 26, § 20. Italics added.

tory language, following reference to some "other" writing, although prefixed by the word "or," could also be taken to refer to the subsequent will or codicil mentioned therein, could be read as if "or" meant "and," thereby leading to the result that the revocatory instrument, whether a subsequent will or not, should disclose an express intent to revoke the former will if it is designed to have that effect.⁵⁵ On the other hand, the grammatical precision to be found in other statutes forbids any such inference and therefore leads to the conclusion that a subsequent will without an express clause of revocation is sufficient, at some point of time or another, to nullify the former one,⁵⁶ although some other type of writing lacking express statement would not be.

After the question whether an express clause of revocation in a subsequent will is or is not necessary has been settled, there then arises the problem as to the scope of such revocation. A few of the statutes would seem to indicate that the subsequent will, in order to possess revocatory effect, should nullify the former will *in toto*.⁵⁷ Others seem to contemplate that the subsequent will might accomplish a partial revocation for the great bulk of the statutes allow the revocation of "any clause" or "any part" of the earlier will,⁵⁸ thereby intimating that the remainder thereof shall stand unaffected.

There are, moreover, a substantial number of statutes which add the phrase "or altered" to the word "revoked" so as to make the subsequent will serve both as a revocatory and an amendatory instrument.⁵⁹ If the later will presents a total altera-

⁵⁵ Such construction might be possible, judging from the wording and punctuation to be found in the statutes of Ark., D. of C., Fla., Ida., Md., Mont., N. York, N. Car., N. Dak., Pa., R. I., S. Car., S. Dak., Utah, Va., and W. Va.

⁵⁶ Compare the statutes mentioned in the preceding footnote with those found in Kas., Ky., Mich., and Minn.

⁵⁷ The omission of phrases such as "any clause" or "any part thereof" typical of most statutes, may be of significance in Ala., Colo., Conn., Hawaii, Me., Mass., Nev., N. Mex., Ohio, and Vt.

⁵⁸ A most unusual provision exists in Illinois where the statute indicates that the later will serves as a total revocation if it contains an express clause to that effect, but otherwise serves merely in the capacity of a codicil. See Ill. Rev. Stat. 1945, Ch. 3, § 197.

⁵⁹ C. f. the statutes of Ark., Cal., Del., Fla., Ida., Kas., Minn., Mont., N. Y., N. Dak., Okla., Pa., S. Dak., and Utah. Compare with N. Car., Gen. Stats. 1943, Vol. 2, Ch. 31, § 31-5, which permits alteration by a holographic will, and Tenn., Williams Code Ann. 1934, Vol. 5, Tit. 3, Ch. 1, § 8097, which approves of alteration by a nuncupative will.

tion of the former one, being inconsistent in all points by comparison with its predecessor, there would be no error in calling the later instrument a "will" for it could properly substitute an entirely new dispositive scheme in lieu of the old one. Revocation in such instances would then follow at some point of time, whether expressed or not, since the testator could not be said to possess two different testamentary intents at the same time and the latest expression thereof should control.

Where, however, the statute not only permits revocation and alteration of an earlier will but, as a number of them do,⁶⁰ goes so far as to permit a will "or any part thereof" to be revoked or altered by a subsequent will, there is occasion to believe that the latter is not really a will but more nearly a codicil. If no more than a codicil, its existence should logically produce merely a partial rather than a total revocation, thereby leaving the earlier will to stand unrevoked at least to the extent that it is not inconsistent with the later will. Most such statutes, nevertheless, overlook the point for they fail to explain the legal consequences of making a subsequent will which revokes or alters a former one in part rather than in its entirety.

Recognition of this problem has been accorded in six of the American jurisdictions, located in proximity to one another, which permit partial revocation or alteration, for each has enacted an identical provision which declares that:

A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the prior will. In other cases, the prior will remains effectual so far as consistent with the provisions of the subsequent will.⁶¹

In those states, and in Louisiana and Illinois,⁶² express declara-

⁶⁰ See statutes listed in note 59, ante, except for Ark., Del., Kas., and Minn. While Tennessee does not purport to authorize alteration of a part of a will, it has been held that the method there indicated can operate only to alter bequests of personalty: *Greer v. McCrackin*, 7 Tenn. (Peck) 301, 14 Am. Dec. 755 (1824).

⁶¹ The six statutes referred to are to be found in Cal., Mont., N. Dak., Okla., S. Dak., and Utah.

⁶² La., *Dart Civ. Code* 1945, Vol. 1, Ch. 6, § 6, Art. 1691; Ill. *Rev. Stat.* 1945, Ch. 3, § 197.

tion of intention to revoke is, of course, highly essential if such is the testator's purpose, for the mere existence of a later will is, *ipso facto*, insufficient to revoke the former one and the two must, so far as possible, be read together.

With the exceptions thus noted, the bulk of the American statutes indicate that an earlier will is revoked, at some time or another, by the proper execution of a subsequent will even though the latter is silent on the precise point of revocation.⁶³ Such statutes appear to be predicated on the idea that the power to make a will necessarily implies the power to revoke it,⁶⁴ and that the latest expression of the testator's intention, evidenced by the making of a subsequent will, is to be regarded as the controlling one. Those statutes, however, are usually silent as to when the revocation occurs, unless that fact may be gathered from other provisions which might be found therein dealing with the revival of a revoked will. Too frequently, though, the statute which is not sufficiently worded to require the presence of an express revocatory clause in the subsequent will is usually likewise silent on the means to be pursued to revive a former one.⁶⁵ In those jurisdictions, therefore, problems such as are here being considered must be left to judicial consideration and nothing can be determined, from perusing statutory language, other than the fact that at some time or another, and by some means or another, the proper execution of a later will should operate to revoke an earlier one.

2. *Revocation by Codicil*

It is possible, both in England and in twenty-seven American jurisdictions, by virtue of express statutory language, to revoke an existing will by the due execution of a codicil

⁶³ Statutes without provision for an express revocatory clause in a subsequent will, but indicating that the mere existence thereof is enough, may be found in Ala., Ariz., Conn., Del., Hawaii, Ind., Iowa, Me., Mass., Miss., Mo., Neb., Nev., N. Hamp., Ohio, Tex., Vt., Wash., and Wis.

⁶⁴ Statutory expression on that point is to be found only in Ga., La., Wis., and Wyo.

⁶⁵ Notable exceptions on this score among the statutes listed in note 63 ante, are Ala., Hawaii, Ind., Mo., Nev., Ohio, and Wash., each of which contains a provision on revival.

thereto.⁶⁶ Such codicil must necessarily be in writing and, typically, should be executed with the customary formalities required for the execution of a will in the first instance, but whether it should contain an express revocatory clause or not is, in the main, as much the subject of doubt as has been noted in the case of a subsequent will. In Colorado, the statute requires that the codicil designed to revoke an existing will shall be one "declaring the same."⁶⁷ The New Jersey provision recites that no revocation shall occur except by ". . . (b) Another will or codicil in writing revoking or altering the same."⁶⁸ But in all other instances, where there is reference to a codicil as a revoking instrument, the statutes are no more explicit than was seen to be the case with respect to a subsequent will.

Inasmuch as the primary function of a codicil is to serve as a modifier of the will to which it becomes a part, it would seem that total revocation ought not to be produced merely because the testator has seen fit to execute a codicil thereto. If such is his design, as made apparent through the use of an express revocatory clause, the codicil ought to accomplish his purpose even in the remaining states for while the statutes found there do not declare that a codicil can be used as a revoking instrument still it may be deemed to be such an "other writing" as would be sufficient under most of these statutes to produce the desired end. It so happens that in all but five instances out of the remaining twenty-three, while such statutes are silent on the point of whether a codicil will serve to revoke an existing will, they do permit revocation by some writing other than a subsequent will.⁶⁹ There may be a subordinate problem, however, as to whether the codicil, although executed according to the formalities necessary for a will, can meet the requirements concerning attestation and the

⁶⁶ C. f., Ariz., Colo., Conn., D. of C., Fla., Hawaii, Ky., Me., Md., Mich., Miss., Neb., Nev., N. Hamp., N. Jers., N. Car., Ohio, Pa., R. I., S. Car., S. Dak., Tex., Vt., Va., W. Va., Wis., and Wyo.

⁶⁷ Colo., Stats. Ann. 1935, Vol. 4, Ch. 176, § 40.

⁶⁸ N. Jers., Stats. Ann. (Perm. Ed.), Tit. 3, Ch. 2, § 3:2-4.

⁶⁹ Of the twenty-three jurisdictions not named in note 66, ante, all permit revocation by some writing other than a subsequent will except Iowa, Missouri, Tennessee and Washington. The Oregon statute, as has already been noted, is totally silent on the subject of revocation.

like essential if an "other writing" is used. The formal requirements for the latter, while generally the same, may vary from those necessary to the proper execution of a will or codicil.⁷⁰

In the case of the five instances referred to above, three of the statutes permit the partial revocation of an existing will by the execution of a subsequent one, so there is at least tacit acknowledgment that the latest testamentary document, if not specifically designed to revoke the whole of the former one, is really a codicil in operation and can have only a modifying effect on the original will.⁷¹ In the other two jurisdictions, to-wit: Oregon and Tennessee, one has no statute on the subject and the other merely concerns itself with attempted revocation by a nuncupative will.⁷² Considered in that light, it would seem as though a substantial portion of the American states treat a codicil as having no more vitality, insofar as revocation is concerned, than enough to produce, at some time or another, a modification but not a nullification of the former will.

3. Revocation by Other Writing

Forty of the American jurisdictions possess statutory provision for the revocation of an existing will by means of some writing other than a later will or codicil.⁷³ The source of such provisions is, in all probability, the English Statute of Frauds which had declared that the revocation might be produced by some "other writing declaring the same."⁷⁴ Despite the common parentage, however, there is considerable diversity among these provisions over whether (1) the writing must expressly declare the testator's purpose to revoke his earlier will,⁷⁵ (2) can accom-

⁷⁰ See, for example, Dela. Rev. Code 1935, Ch. 93, § 3715.

⁷¹ C. f., Iowa, Missouri, and Washington.

⁷² Tenn., Williams Code Ann., 1934, Vol. 5, Tit. 3, Ch. 1, § 8097.

⁷³ The exceptions are Colo., Conn., Hawaii, Iowa, Mo., Nev., Ore., Tenn., Wash., and Wyo.

⁷⁴ 29 Car. II, c. 3, § 6.

⁷⁵ Specific language to that effect appears in twenty-five of the statutes. See Ark., Cal., D. of C., Fla., Ga., Ida., Ill., Kas., Ky., La., Md., Minn., Mont., N. J., N. Y., N. Car., N. Dak., Okla., Pa., R. I., S. Car., S. Dak., Utah, Va., and W. Va. The statutes of Mississippi and Texas call for a "declaration in writing" instead of merely for some "other writing." It would seem that to be an effective "declaration" the document ought to contain a complete expression of the testator's purpose.

plish that end by some tacit but inferrable intent,⁷⁶ or (3) must refer to the earlier will in precise terms of description at the time he declares his purpose to revoke it.⁷⁷

There is also doubt over the point whether such "other writing" must produce a complete nullification of the former will or can be used merely to revoke a part thereof. It has been noted that under the statutes of most states a subsequent will can serve to revoke the earlier one either in whole or in part.⁷⁸ The state statutes which permit a subsequent will to operate either way, and which likewise permit revocation by the use of an "other writing," logically authorize either partial or total revocation of the former will in the fashion here considered.⁷⁹ In the other states, the "other writing" referred to must produce a total revocation of the earlier will or else it can have no operative effect whatever.⁸⁰

Following the pattern already indicated with respect to subsequent wills,⁸¹ a sizeable number of American jurisdictions purport, by statute, to permit an "other writing" not only to revoke but also to alter an existing will.⁸² Such language might be regarded as intimating that testamentary documents might be found to consist of (1) wills, (2) codicils, and (3) anomalous "other writings," were it not for the fact that wherever such "other writing" might serve as an alteration of an existing will it obtains its validity, in all instances, from the fact that it has been

⁷⁶ See the statutes of Ala., Ariz., Dela., Ind., Kas., Me., Mass., Mich., Neb., N. Hamp., Ohio, Vt., and Wis.

⁷⁷ The New Mexico statute, Stats. Ann. 1941, Vol. 2, Ch. 32, § 32-108, says the instrument should be one that "distinctly refers to such will."

⁷⁸ See notes 57 and 58, ante.

⁷⁹ Statutes which appear to permit either partial or total revocation may be found in every state except Ala., Ark., Cal., Colo., Conn., Hawaii, Ill., Kas., Me., Mass., Nev., N. Mex., Ohio, Ore., and Vt.

⁸⁰ See note 79, ante. The statutes in Colo., Conn., Hawaii, and Nev., noted as being an exception to the general rule that a subsequent will may produce either partial or total revocation of an earlier will, do not permit the use of an "other writing" for any purpose but limit revocation to wills and codicils.

⁸¹ Note 59, ante.

⁸² C. f., Ark., Cal., Dela., Fla., Ida., Kas., Minn., Mont., N. Y., N. Dak., Okla., Pa., S. Dak., and Utah. The North Carolina statute contains two separate clauses. The first, dealing with revocation alone, limits the other writing to one executed pursuant to the usual formalities, while the second authorizes both alteration and revocation by a holographic instrument.

executed with at least the full formalities required for either a will or a codicil so is essentially on a par with, if not in fact, one or the other of the latter. Any confusion in nomenclature arising from provisions of this character, therefore, may well be disregarded as it probably arises from an attempt to give statutory basis for the use of a codicil as a modifying instrument while, at the same time and in the same paragraph, combining the subject with that of revocation. In all other instances, however, the "other writing" is confined in purpose to serve merely to revoke the former will either in whole or in part.⁸³

It might also be again noted that only in the case of the statute of Georgia⁸⁴ is there any consideration given to the precise moment of time when the "other writing" shall be effective for the purpose and even there it can possess immediate effect upon execution only if the writing contains express revocatory language. The existence of some statutory language on the subject, therefore, merely serves to point up more strongly than ever the fact that the manifold problems which could arise are far from answered by a perusal of the legislative expressions on the subject. The most that can be gathered therefrom is that if the testator dies leaving both a properly executed will and a subsequent "other writing" of revocatory character in existence, provided the latter cannot operate as a later will or codicil, he must then be said to have died intestate since the former testamentary intent has been abrogated, if not before then at least at the moment of death, by the latest expression of his purpose.

B. STATUTES AS TO REVIVAL

Some of the unsolved difficulties posed under statutes dealing with the revocation of earlier wills by the execution of subsequent written instruments may find resolution in the event there is legislation purporting to deal with the means by which a will,

⁸³ It should be noted that while partial revocation is permitted in most jurisdictions, it is apparently not recognized in others. See notes 57 and 58, ante.

⁸⁴ Ga. Code 1933, Ch. 113, § 402, indicates that an "express revocation . . . by writing . . . takes effects instantly or independently of the validity or ultimate fate of the will or other instrument containing the revocation."

admittedly revoked, may be revived. In that respect, statutes of some sort exist in twenty-five of the American jurisdictions. By and large, such statutes probably find their genesis in Section 22 of the English statute which directed that no will or codicil, or any part thereof, which had been revoked should be revived "otherwise than by the Re-execution thereof, or by a Codicil executed in the manner herein-before required, and showing an intention to revive the same."⁸⁵ If the earlier revocation there referred to had been accomplished by some physical act such as tearing off the signature, the attestation clause or the like, there would be no doubt that such conduct, when intentionally performed, operated to produce an instant revocation for immediately thereafter there was no instrument which could have met the requirements for probate had the testator then died. Under such circumstances, the re-execution of the revoked will or the adoption thereof by a codicil would be appropriate ways to give new life to that which had thereby become extinct. Whether the same acts should be required, or be even necessary, if the earlier will remained in full physical condition, and the only event that happened after its due execution was the making of a later will which had been subsequently destroyed, is not so simple a question.

It might be argued, following the common-law view, that since the subsequent will possesses an ambulatory character giving it no possible operative effect until the testator dies, the original will has not been rendered invalid by the mere execution of the later one so that, in the event of the physical destruction of the latter, the former has never ceased having potential existence hence need not be "revived." Talk about revival under such circumstances would clearly be illogical. If such view currently exists in some of the American jurisdictions, it has been rendered innocuous in at least twenty-one states which, removing some of the uncertainty created by the indefiniteness in the English stat-

⁸⁵ The English statute also contains a clause, not found in any of the American counterparts, which reads: ". . . and when any Will or Codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such Revival shall not extend to so much thereof as shall have been revoked before the Revocation of the whole thereof, unless an Intention to the contrary shall be shown."

utes,⁸⁶ have indicated that the due execution of a subsequent will has produced the revocation of an earlier will, or wills, by specifying that the destruction of the later will shall not operate to revive the former one.

Nineteen of these states have adopted what might be considered to be a standard provision which declares that the making of any subsequent will or writing followed by the cancellation, destruction⁸⁷ or revocation thereof does not revive any will previously executed.⁸⁸ The other two express the same idea but confine the situation to cases where the subsequent will expressly revoked the former one.⁸⁹

While such provisions do not say, in so many words, that the former will was effectively revoked instantly upon the due execution of the later one, it can only be reasoned, from the necessity for some form of revival procedure, that the later will must possess that effect or there would, logically, be no occasion to refer therein to the means to be followed in order to revive the old one. There is some confusion, however, apparent in the case of five of the states having revival statutes.⁹⁰ Each of them first recites that a prior will is not revoked by a subsequent one unless the latter contains an express clause of revocation or sets forth provisions wholly inconsistent with the terms of the former will. Each then, in a separate paragraph, goes on to provide, following the standard clause, that the destruction, cancellation or revoca-

⁸⁶ The Statute of Frauds is silent on the subject of revival. 1 Vict., c. 26, § 20, following the Statute of Frauds, merely declares the manner of revocation. Section 22 thereof, although describing the way by which a will "which shall be in any manner" revoked is to be revived, presupposes the nullity of the former will.

⁸⁷ Only destruction will suffice according to Ga. Code 1933, Ch. 113, § 403.

⁸⁸ Allowing for local variations, such provision reads: "If, after [the] making [of] a [any] will, the testator makes [shall duly make and execute] a second will, the destruction [cancelling or revocation] [or other revocation] of the [such] second will does [shall] not revive the first will. . . ." See the statutes of Ark., Cal., Hawaii, Ida., Ind., Kas., Mo., Mont., Nev., N. Y., N. Dak., Ohio, Okla., Ore., S. Dak., Utah, and Wash. While the Ala. provision is phrased differently it is closely akin to the others: Ala. Code 1940, Tit. 61, § 27. N. Mex. Stats. Ann. 1941, Vol. 2, Ch. 32, § 32-109, states the idea as follows: "If a person having made a first will, should make a second, annulling the first, and afterwards annuls the second, the first will is not thereby made valid, unless the validity of the first will be acknowledged."

⁸⁹ See statutes of Florida and Georgia.

⁹⁰ The five are Montana, North Dakota, Oklahoma, South Dakota and Utah.

tion of "a second [or subsequent] will" does not revive the first will. If, as is probably the legislative intent, the "second will" referred to is one that produces a revocation because expressly or impliedly so requiring, then the revival provision can have significance, otherwise it flatly contradicts the prior expression that the two or more wills are to be construed together so far as possible. Assuming the former to be the case, and in those states where no such conflict exists, it then becomes pertinent to examine the revival procedures established by statute for it certainly ought not to be the policy of the law to compel a rewriting as well as a formal re-execution of the original testamentary scheme if the original document is still extant.

The English method calls for (1) a re-execution of the original will, or (2) the making of a codicil thereto, either being accompanied by an intention on the part of the testator to revive the revoked instrument. It is worthy of some note that only six of the twenty-five statutes in this country bearing upon revival go to the length of requiring re-execution of the original instrument,⁹¹ and only five out of those six indicate that a properly executed codicil will suffice.⁹² It cannot be said, therefore, that the English statute, even though it may have furnished the idea for statutory regulation of the subject, has had much influence on the methods to be pursued in this country.

By far the predominant method utilized here is that of re-

⁹¹ Provisions found in the District of Columbia, Kentucky, Virginia, and West Virginia are essentially similar in character if not in phraseology. They differ from the English model in that they contain a proviso that the revival shall be "only to the extent to which an intention to revive is shown." The statute of Florida directs that the revoked will "may be republished and made valid by the re-execution of the same with the formalities required by law for the execution of wills." Such language raises a question as to whether the word "may" is to be given permissive or mandatory effect. The Nevada statute permits revival either if the subsequent will is revoked with intention to reestablish the earlier one or if "the first will shall be duly re-executed."

⁹² The Nevada statute omits reference to a codicil as a means of revival. The Florida one contains a paragraph specifically recognizing that "a codicil referring to a previous will has the effect of republishing the will as modified by the codicil." It is doubtful, however, if a codicil would serve the purpose of reviving a revoked will since the revival provision, while indicating that the earlier will "may be republished," continues with the additional requirement that it be made valid "by the re-execution of the same with the formalities required by law for the execution of wills." Republication alone would seem to be insufficient for the purpose.

publishing the original revoked will, for eighteen of the statutes sanction it as a means, sometimes the only specified means, of bringing about a revival.⁹³ As the term "republication" is often used as a synonym for "re-execution,"⁹⁴ it might be said that statutes of this class contemplate such an act on the testator's part as would have been necessary to make a valid will in the first instance. On the other hand, as republication evidences a desire to give new validity, as of the date of republication, to a will which was executed some time before then, that result could also be achieved through the use of an adequate and properly executed codicil even though the statute be silent as to that precise means. In either event, since wills or codicils must generally now be executed according to the same formalities, there should be no doubt in these jurisdictions that re-execution should be adequate to produce a revival of the former will.

Whether anything less will suffice, for example an independent oral announcement by the testator, made in the presence of witnesses on some occasion subsequent to the destruction or cancellation of the later will,⁹⁵ to the effect that he desires his earlier will to stand as representing his scheme for the disposition of his estate, would have to be judicially determined by construing the word "republication" as used in such statutes. If "republication" means no more than reiterating the original ceremony of "publishing" the will, then re-execution, involving the compound

⁹³ It is an alternative method under the statutes of Ala., Ark., Cal., Ida., Ind., Kas., Mo., Mont., N. Y., N. Dak., Ohio, Okla., Ore., S. Dak., Utah, and Wash. None of these statutes require anything more than that the earlier will be "duly republished," except for Kansas which, in 1939, added the qualification that the republication should occur "in the presence of two or more competent witnesses who shall subscribe the same in the presence of the testator." See Kas. Gen. Stat. 1945 Supp., Ch. 59, § 59-612. According to Georgia and Hawaii, republication is the only method, although the former permits oral proof thereof.

⁹⁴ Page, *op. cit.*, Vol. 1, § 505.

⁹⁵ The revival provisions usually indicate that the "republication" is to come "*after* such destruction, cancellation or revocation" of the subsequent will. Italics added. It might, then, be the concluding step in one continuous transaction or could occur on some other and distinct occasion. Only under the statutes of Arkansas, Missouri, Oregon and Washington could it be argued, because of the noticeable omission of the phrase "*after* such destruction," that the ceremony of "republication," whatever its form, should be a part of the transaction at which the subsequent will is revoked and the earlier one revived.

elements of signing, sealing, attestation and the like should not be necessary.⁹⁶

If the act of revival occurs simultaneously with the destruction, cancellation or revocation of the later will, some help is provided by the language found in a number of the American revival statutory provisions. They declare that if it shall appear "by the terms of such revocation that it was his [the testator's] intention to revive and give effect to his first will," then the same shall stand revived and in full force and effect.⁹⁷ It is noteworthy, however, that such statutes, while specifying the time of its disclosure, provide no precise means by which such intention shall be made known other than that it be revealed in the "terms of such revocation," hence must form a part of that transaction. It might be the case that the method pursued to revoke the subsequent will could take the form of either a new will, a codicil, or some "other writing" where that will serve as a revoking instrument, in which event it would be a simple matter for the testator to disclose his intention by apt language over his signature duly authenticated so as to possess credibility should the point be made the subject of a later challenge. Inasmuch, however, as the revocation of the subsequent will may be produced by an act of physical destruction, such as a burning or tearing, there would probably be no written record of that transaction so any "intention to revive" the older will would doubtless have to be found in oral statements which might have been made by the testator coincident with that conduct.

It is at this point that these revival statutes disclose their most serious weakness for while a will may not, generally, be revoked by oral statements yet, once revoked, it may be given new

⁹⁶ Point is added to such argument under the Kansas provision for it is the only one to provide any clue to the steps necessary for revival. It recites that the testator "shall duly republish his first will in the presence of two or more competent witnesses who shall subscribe the same in the presence of the testator." The absence of any direction that the will should be re-executed, in view of the other precise requirements, lends credence to the idea that "republish" and "re-execute" are not truly synonymous. The Georgia statute, on the other hand, expressly indicates that the "republishing may be proved by parol."

⁹⁷ See statutes listed in note 93, ante, and also Nev. Comp. Laws 1929, Vol. 4, § 9913.

life by the very sort of parol testimony which originally caused the passage of the Statute of Frauds.⁹⁸ The testator who would avoid tempting those who might be lightly turned toward perjury would necessarily have to revoke his earlier will by some physical act which totally removed it from existence, after which revival could be accomplished only at the cost of making an entirely new, even though identical, will. His retention of the original will in sound physical condition, followed by the revocation of some later testamentary instrument which he might have destroyed under the belief that he would thereby die intestate, could expose his legal heirs to the hazard that their expectations would be defeated if perjured testimony was available to establish the purported fact that, at the moment of destruction of the later will, the testator was supposed to have said that he wished the original will to stand. In the absence of any presumption to be drawn one way or another from the fact that the original will still remained intact at the testator's death, the statutory foundation for the admission of parol testimony of that character is, to say the least, highly inconsistent with the general safeguards thrown around the testator's estate so as to insure that it reaches the hands of those to whom it was intended to come.⁹⁹

Revival in the fashion indicated by these more or less standard provisions is, in any event, confined to a total revival of the earlier will in all its terms for no allowance is made therein for anything else. In that respect, they do agree with the English statutory views on the subject. Four of the American statutes which might be said to be modelled on the lines of the English one, however, contain a clause not found therein which authorizes revival only to the "extent to which an intention to revive the same is shown."¹ Under such statutes, still further confusion is

⁹⁸ W. W. Ferrier, Jr., "Revival of a Revoked Will," 28 Cal. L. Rev. 265 (1940), particularly pp. 271-6, furnishes critical comment on this fact.

⁹⁹ The New Mexico provision is even more vague for it merely requires that "the validity of the first will be acknowledged." It neither specifies the means to be used nor does it limit the time of the acknowledgment to the moment of revoking the subsequent will. The prospect of combatting perjury is, therefore, made more difficult than in the other states where the witnesses to the alleged revival are at least tied down to a precise point of time and space.

¹ See the statutes of the District of Columbia, Kentucky, Virginia and West Virginia.

added since the testator is permitted to revive such parts of his former testamentary scheme as he may see fit, leaving the rest to remain in the limbo to which they were consigned by the act of executing the subsequent will or codicil or the making of the other revocatory instrument.

In all the other states, no consideration appears to have been given by the legislatures to the many and complicated problems which can grow from the simple facts originally outlined for twenty-four of the statutes, while containing some expression on the subject of revocation, are utterly silent on the point of revival. In those states, and even in the ones which do have statutes but which statutes, as has been seen, are not complete on all points, there is considerable work left for the judicial department to perform before ready answers can be found to all of the questions which might be raised. It is, therefore, necessary to turn to the judicial decisions to ascertain what answers might there be provided to either the fundamental aspects of the problem of revocation and revival or to the many collateral ones introduced by partial, and often imperfect, legislative treatment of the subject.

To be continued